IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2008 Session

JONATHAN C. NESBITT v. KIMBERLY K. NESBITT

Appeal from the Circuit Court Davidson County
No. 05D-2490 Carol Soloman, Judge

No. M2006-02645-COA-R3-CV - Filed January 14, 2009

Wife appeals the lower court's entry of a Parenting Plan and the division of marital assets in the final decree. Finding error in the division of marital assets, we modify the court's order in that regard; in all other respects the judgment of the trial court is affirmed.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed As Modified

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

David Scott Parsley and Michael K. Parsley, Nashville, Tennessee, for the appellant, Kimberly K. Nesbitt.

Gregory D. Smith, James Glasgow Martin and Rebecca Kathryn McKelvey, Nashville, Tennessee, for the appellee, Jonathan C. Nesbitt.

OPINION

I. Factual and Procedural History

Jonathan and Kimberly Nesbitt were married on April 27, 1996, and have two minor children, aged 9 and 7 years old at the time of trial. Wife is a board-certified anesthesiologist who worked part-time during the marriage to serve as a stay-at-home mother. Husband works full-time as a board-certified thoracic surgeon.

Dr. Jonathan Nesbitt ("Husband") filed a complaint for divorce in the Circuit Court of Davidson County on July 12, 2005, alleging irreconcilable differences. Dr. Kimberly Nesbitt ("Wife") filed an answer and a counter-complaint for divorce on September 15, 2005, citing irreconcilable differences and inappropriate marital conduct. Husband filed an answer to Wife's

complaint on June 2, 2006, and amended his complaint on June 28, 2006, to include inappropriate marital conduct.

A trial was held on October 9, October 10, October 12, and November 2, 2006. The court entered an order on November 13, 2006, granting the divorce on the grounds of each party's claim of inappropriate marital conduct. Wife filed a Notice of Appeal on December 5, 2006.[1] The court entered its Memorandum Opinion and Final Order on March 23, 2007, and an order setting child support on April 18, 2007. The March 23 order was amended on April 19, 2007, and then again on July 24, 2007.

A. The Parenting Plan

During the hearing on October 10, 2006, while discussing aspects of a parenting plan, the trial court suggested a parenting plan that would split custody of the children between Husband and Wife. Wife had concerns about the effectiveness of the plan because of the parties' communication problems, and the court agreed to subject its suggested parenting plan to a three month trial period.[2] Notwithstanding the trial court's suggested parenting plan, the court recessed the proceedings to provide the parties an opportunity to reach their own mutually agreed upon parenting plan.

The parties eventually agreed on a parenting plan ("Parenting Plan"), which differed from the plan suggested by the trial court; the parties signed and announced the plan to the judge at the hearing on October 12, 2006. Both sides acknowledged at that hearing that they were unable to reach an agreement which would implement the Parenting Plan on a trial basis.[3]

Following the submission of the Parenting Plan to the court, Wife filed a Motion to Reopen the Parenting Issue on October 25, 2006. At the November 2, 2006 hearing, the court denied the motion, stating that it was "not going to address [Wife's] motion to change the parenting

---

[1] Wife's Notice of Appeal, filed on December 5, 2006, was an appeal of the trial court's November 13, 2006, order. The Memorandum Opinion and Final Order, however, was not entered until March 23, 2007, and was subsequently amended on April 19, 2007, and July 24, 2007. Pursuant to Tenn. R. App. P. 4(d), "[a] prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof."

[2] The court was attempting to avoid a situation where the parenting plan would be a final order and Wife would be required to prove a material change in circumstances to modify it. The court stated "[w]hat if you tried it for three months without any necessity for a change of circumstances, and came back to me told me how - and really tried - and talked to the psychiatrist and see if it's working." Wife's attorney explained to Wife that "[w]hat happens is that if there's a final order, in order to get any change in a Parenting Plan you have to show some significant material change of circumstances." The court told Wife that if she agreed to the trial court's plan, she would not be "locked in," and that they would revisit the issue, if needed.

[3] At the October 12, 2006 hearing,,Wife's attorney admitted that "...[the court] had mentioned a trial period, which was not something that [Husband's attorney] was willing to agree on...." Husband's attorney later explained that "[t]he reason that we absolutely, under no circumstances, would agree to a trial period is because we were morally certain [Wife] would sabotage it...The children need to be made to understand this is the parenting plan."

agreement...[Wife] announced it, it was an order of the Court, [the court has] signed it. There's no material change of circumstances."[4] The Parenting Plan, however, was not signed by the court at that time.

The Parenting Plan designated Wife as primary residential parent, and provided her with custody for 208 days and Husband with custody for 157 days; a school year and holiday schedule was also outlined. The Parenting Plan required joint agreement between the parties for major decisions. Lastly, in order to facilitate the implementation of the Parenting Plan, the parties agreed to the appointment of a parent coordinator. The role of the parent coordinator was outlined in the Parenting Plan as follows:

> The parties will seek the assistance of Dr. Joe McLaughlin...to serve as family counselor/parent coordinator for the purpose of phasing in the Parenting Plan based on whatever schedule the family counselor/parent coordinator deems appropriate. As part of the process, the family counselor/parent coordinator will meet with the parents and/or children on whatever schedule he deems appropriate. Thereafter, the family counselor/parent coordinator will assist the parties in resolving any disputes which may arise. In the process, the family counselor/parent coordinator will not make recommendations to the parties based solely on what either child desires but will give primary consideration to the emotional well-being of the children.

The Parenting Plan was signed by and made the order of the court on November 6, 2006.

B. The Smith Barney Account

The trial court addressed the division of the marital assets in its March 23 order, which disposed of, among other things, a Smith Barney account held in Husband's name. The court found that $413,441 of the funds were Husband's separate property and $120,666 was marital property. In classifying $413,441 of the account as separate property, the court, with the help of an accountant, was able to trace that amount to funds held separately by Husband prior to the marriage. The court stated that any increase to the separate portion of the account was Husband's separate property, and any increase to the marital portion was marital property and to be divided equally.[5]

---

[4] Later in the proceedings on November 2, Wife again raised issues she had with the Parenting Plan, and the court asked Wife's attorney if she told Wife "it was a judgment of the Court when it was announced?" Wife's attorney replied that she had. The court reaffirmed that it would not address problems Wife had with the plan because it became a judgment of the court when Wife announced it on October 12.

[5] In addressing the Smith Barney account, the trial court's order held that any increase to the marital portion would be equally divided, but neglected to state how the marital portion itself was to be divided. Every other time the trial court's order classified an asset as marital property, the court stated that the marital property would be equally divided.

C. Marital Home

The March 23 order divided the parties' interest in the marital home, awarding a 60% interest to Husband and a 40% interest to Wife. In making this division, the court acknowledged Husband's "huge separate capital investment" in the acquisition of the marital home, including proceeds from the sale of another house owned solely by Husband and from Husband's entire inheritance from a relative.

D. Equitable Division of Marital Assets

The March 23 order required each party to pay his or her own attorney's fees. Wife alleged at trial that Husband used $100,000 from the marital estate to pay for his attorney's fees, and she urged the court to consider this conduct when making an equitable division of the marital property. The court's order did not address this issue.

STATEMENT OF THE ISSUES

On appeal, Wife raises the following issues:

1. Whether the Parenting Plan granting split custody[6] was in the best interest of the children.

2. Whether the court erred in not reopening the Parenting Plan after the court assured Wife that the plan was to be implemented on a three month trial basis, with no need to demonstrate a material change in circumstances.

3. Whether the court had the authority to appoint a parent coordinator who was authorized to modify the Parenting Plan, and if the court lacked the authority, whether it erred in failing to set aside the Parenting Plan.

4. Whether the court erred in not setting aside the Parenting Plan when Wife withdrew her consent.

5. Whether the court erred in its classification of a portion of the Smith Barney account as separate property.

6. Whether the court erred in its division of the marital residence by classifying Husband's investment in the acquisition of the marital home as separate property

7. Whether the court erred in failing to reduce Husband's award of marital property due to his use of marital funds to pay his attorney fees.

---

[6] In other portions of her Brief, Wife correctly refers to the court's order as awarding joint custody.

STANDARD OF REVIEW

A "review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 570. We review the trial court's conclusions of law under a *de novo* standard, with no deference to the conclusions made by the lower court. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569-70 (Tenn. 2002); *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

ANALYSIS

I. The Parenting Plan

Two weeks after the Parenting Plan was submitted to the court, Wife filed a Motion to Reopen the Parenting Issue, which the trial court denied. On appeal, Wife asserts that the trial court erred in not granting the motion because the Parenting Plan was not in the best interest of the children, did not contain a three month trial period, granted the parenting coordinator improper authority, and was not set aside when Wife withdrew consent for the plan. We find no error in the court's adoption of the Parenting Plan.

Best Interest of the Children

Wife first asserts that the Parenting Plan adopted by the trial court was not in the best interest of the children because the statutory factors used to determine the best interest of the children weigh in her favor and the "tumultuous relationship" between she and Husband would expose the children to parental conflict and undermine the children's psychological well-being.

Tenn. Code Ann. § 36-6-101 states in part:

> (a)(1) In a suit for...divorce..., where the custody of a minor child or minor children is a question, the court may...award the care, custody and control of such child or children to either of the parties to the suit or to both parties in the instance of joint custody or shared parenting, or to some suitable person, as the welfare and interest of the child or children may demand... Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.
>
> (a)(2)(A)(i) ... *the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child*. Unless the court finds by clear and convincing evidence to the contrary, *there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child*.

(Emphasis added). "In a suit for...divorce..., or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child." Tenn. Code Ann. § 36-6-106. The relevant statutory factors a court uses in determining the best interest of the child are found under Tenn. Code Ann. § 36-6-106.

The determination of the best interest of a child is a factual question, and this Court will presume a trial court's factual findings to be correct, unless evidence preponderates otherwise. *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). In reviewing a trial court's judgment, "we are mindful that '[t]rial courts are vested with wide discretion in matters of child custody' and that 'the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion.'" *Johnson v. Johnson*, 169 S.W.3d 640, 645 (Tenn. Ct. App. 2004) (quoting *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993)). "Because '[c]ustody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during...proceedings themselves,' appellate courts 'are reluctant to second-guess a trial court's decisions.'" *Johnson*, 169 S.W.3d at 645 (quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1993)).

The trial court's March 23 order made a factual finding in relation to the Parenting Plan, stating:

> That the parenting plan, finally agreed upon by the parties after almost 3 days of mediation, is just and good for the children. The children will profit from the parenting time prescribed in the plan if both parties carry out the spirit of the plan and realize that this goal is in the best interest of these children. The Court finds this plan is in the best interest of the children and congratulates the parents' decision to rise out of the conflict and place the children first in their concerns.

Wife argues that the evidence introduced at trial preponderates against the court's finding that the Parenting Plan was in the children's best interest. First, Wife asserts that the statutory factors found at Tenn. Code Ann. § 36-6-106 weigh in her favor because she was the children's primary care giver since birth, she worked part-time, and the children had lived with her during the period of separation prior to divorce.[7] Wife asserts that maintaining these factors would promote stability and continuity for the children. Wife also argues that a joint custody arrangement is not appropriate for the tumultuous relationship between her and Husband because joint custody is most effective when the parties have a "harmonious and cooperative relationship." Wife points to the animosity between the parties and the inability to communicate as evidence sufficient to render joint custody to not be in the children's best interest.

We do not find evidence sufficient to preponderate against the trial court's finding that the joint custody arrangement was in the best interest of the children, who, as aforesaid, were 7 and 9 years old at the time of trial. The court's finding that "the children will profit from the parenting

[7] The record does not reflect an order granting temporary custody or establishing visitation to either party.

time" and the court's anticipation that the parties would "carry out the spirit of the plan and realize this goal is in the best interest of these children" were made after hearing from the parents and having the opportunity to observe their character and demeanor. The court also had an extensive colloquy with the parenting coordinator whose role was to assist the parties in what was acknowledged to be a difficult transition for the children.

The factors cited by Wife as weighing in her favor do not militate against a finding that joint custody with substantial parenting time for each parent was the best for the children. Tenn. Code Ann. § 36-3-106 requires the trial court to consider "all relevant factors," including those specifically listed, in order to determine the best interest of the children; § 36-3-106(a)(10) provides that one of the factors that the court shall consider is :

> Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

In this case, the court considered and the record supports a determination that each parent is responsible[8] and that each has the ability to set their animosity toward the other aside and act in accordance with the best interest of the children. The evidence does not preponderate against the trial court's finding that joint custody was in the best interest of the children.

Furthermore, Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) states that "there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or *so agree in open court* at a hearing for the purpose of determining the custody of the minor child," and that such a presumption can only be overcome by clear and convincing evidence. (Emphasis added). At the October 12, 2006 hearing, Wife agreed in open court to the Parenting Plan presented by both parties, which provided for joint custody; as a result, a presumption arose that joint custody was in the children's best interest. Wife failed to provide clear and convincing evidence to overcome this presumption; as such, the trial court's finding that the Parenting Plan was in the best interest of the children is affirmed.

Trial Period

Wife next asserts that the Parenting Plan should have been subject to a three month trial period. After the trial court denied Wife's Motion to Reopen the Parenting Issue at the November 2 hearing, it nevertheless told Wife from the bench that "[t]here is going to be a trial period." Wife argues that the court's assurance of a trial period required its inclusion in the final order. During the October 10 hearing, the court made clear that any plan other than the trial court's proposed plan

[8] The March 23, 2007, order notes that "[b]oth parties are exceptional parents and these children are very lucky."

would need the agreement of both parties for a trial period to be included.[9] Consequently, the court's suggestion of a trial period only applied to its proposed parenting plan, and any other plan would need a separately agreed upon trial period. Wife and her attorney acknowledged at the October 12 hearing that no trial period was agreed upon in the Parenting Plan presented to the court. As such, we find that the court did not err in not subjecting the mutually agreed upon Parenting Plan to a trial period.

Parenting Coordinator's Authority

Wife's next complaint is that the trial court exceeded its authority in appointing a parenting coordinator who was endowed with the power to modify the Parenting Plan. Wife asserts that "the Parenting Plan Order, on its face, creates a substitute Judge who is authorized to make recommendations, effective immediately as Orders, which violate the most fundamental constitutional rights." Wife points to no evidence in the Parenting Plan, the transcript, or the record to support this claim. The plan authorizes the parenting coordinator to provide assistance to the parties in resolving disputes, and to provide recommendations for such a resolution.[10] Nothing in the Parenting Plan suggests that those recommendations are to be considered orders or that they can modify the terms of the plan. Wife agreed to the appointment of a parenting coordinator, and we do not find that the parenting coordinator's responsibilities impose on the court's authority.

Withdrawal of Consent for Parenting Plan

Lastly, Wife asserts that the trial court should have granted her Motion to Reopen the Parenting Issue because she withdrew her consent from the mutually agreed upon plan. This Court held in *Envtl. Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530 (Tenn. Ct. App. 2000) that:

> there are situations where a party will not be allowed to withdraw its consent to an oral agreement prior to entry of a judgment based on that agreement. At the least, this exception applies to agreements made in open court, on the record, where the detailed terms of the agreement are presented to the court, accepted by the court, and preserved by transcript or other acceptable record of the court proceedings.

27 S.W.3d 530, 539 (Tenn. Ct. App. 2000); *see REM Enters., Ltd. v. Frye*, 937 S.W.2d 920, 922 (Tenn. Ct. App. 1996). The record shows that Wife signed the Parenting Plan, that the plan was read in detail to the court, and that both parties agreed to it in front of the judge. The court accepted the

---

[9] After the trial court proposed its parenting plan that included a trial period but before recessing the proceedings so that the parties could attempt to reach their own mutually agreed upon plan, Wife asked the court "[i]s there a possibility in whatever we agree to that we would still agree to a three-month trial...?" The court replied that it "would agree to anything you'd agree to..."

[10] While discussing the language of the Parenting Plan during the October 12 hearing, the court stated that it did not want the parenting coordinator to "make his ruling on what a child wants." The court then said "I shouldn't call it a ruling, a recommendation."

agreement of the parties and the details of the Parenting Plan were preserved by a transcript of the proceeding. This is the situation contemplated by this Court in *Envtl. Abatement, Inc.*, *supra*.; as such, Wife is prevented from subsequently withdrawing her consent to the mutually agreed upon Parenting Plan that both parties presented to the court.

II. Classification and Division of Marital Property

Tennessee is a "dual property" jurisdiction because its divorce statutes draw a distinction between marital and separate property, requiring that marital property be equitably divided; consequently, proper classification of a couple's property is essential. Tenn. Code Ann. § 36-4-121(a) (2008); *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). Division of the estate begins with the identification of all property interests followed by classification of property as either marital or separate. *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007). Property cannot be included in the marital estate unless it fits within the statutory definition of "marital property," and by the same token, "separate property," as defined by statute, should not be included in the marital estate for division. Tenn. Code Ann. §§ 36-4-121(b)(1) and (2); *Daniel v. Daniel*, M2006-01579-COA-R3-CV, 2007 WL 3202778 at *4 (Tenn. Ct. App. Oct. 31, 2007).

> "Marital property" includes the following:
>
> (1)(A) [A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce....
>
> (B) [I]ncome from any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation....

Tenn. Code Ann. § 36-4-121(b)(1)(A), (B) (2008).

> "Separate property," on the other hand, is defined as follows:
>
> (A) All real and personal property owned by a spouse before marriage ...;
>
> (B) Property acquired in exchange for property acquired before the marriage;
>
> (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);
>
> (D) Property acquired by a spouse at any time by gift, bequest, devise or descent....

Tenn. Code Ann. § 36-4-121(b)(2) (2008).

According to the statute, assets acquired by the parties during the marriage are presumed to be marital property, *see* Tenn. Code Ann. § 36-4-121(b)(1)(A), but that presumption may be rebutted by a preponderance of proof that an asset is actually the separate property of either spouse. *Woodward v. Woodward*, 240 S.W.3d 825, 828 (Tenn. Ct. App. 2007); *Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998). The Tennessee Supreme Court has recognized that property acquired during the marriage that is traceable to separate property will be considered separate property unless it has been gifted to the marital estate or has been inextricably commingled with marital assets. *Keyt*, 244 S.W.3d at 328 n.7. The party seeking to have such separate property included in the marital estate bears the burden of proving that it fits within the statutory definition of marital property. *Id.*

Questions concerning the classification of property as either marital or separate, "as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual," *Owens v. Owens*, 241 S.W.3d 478, 485 (Tenn. Ct. App. 2007), and therefore, a trial court's decision in that regard will not be disturbed unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Woodward*, 240 S.W.3d at 828. Trial courts have "wide latitude in fashioning an equitable division of marital property," and their decisions will be given great weight by the court of appeals. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). The court of appeals will not overturn a trial court's division of marital property in absence of evidence that the distribution "lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures." *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996) (citing *Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn. Ct. App. 1994)).

A. The Smith Barney Account

Wife asserts that the trial court's classification of a portion of a Smith Barney investment account as Husband's separate property was error because the funds cannot be traced to a separate account or, in the alternative, that the funds had transmutated into marital property. We affirm the court's classification of the assets as Husband's separate funds.

Thomas Jacobs, the parties' accountant of nine years, testified at trial that he was able to trace a portion of the funds held during the marriage in the Smith Barney account at issue in this appeal to two separate accounts held by Husband prior to the marriage. Mr. Jacobs testified that the total funds of a Van Kampen account, owned solely by Husband and established prior to the marriage, were first transferred to a Fidelity account, owned solely by Husband and established after the marriage, and then transferred into the Smith Barney account, owned solely by Husband and established after the marriage. Mr. Jacobs also testified about a Sun Trust account, owned solely by Husband and established prior to the marriage, which was transferred into the Smith Barney account at the same time as the Fidelity account. Mr. Jacobs testified that he was able to distinguish between the pre- and post-marital contributions currently held in the Smith Barney account, and that he allocated the earnings pro rata between the contributions made during the pre- and post-marital

periods.[11] When asked how much of the Smith Barney account was pre-marital and how much was acquired during the marriage, Mr. Jacobs testified that "[t]he pre-marital portion is $413,441, and the post-marital portion $120,666."

On cross-examination, Mr. Jacobs admitted that the Van Kampen account was liquidated into cash, prior to transfer into the Fidelity fund. When asked by counsel if he could "trace back anything that's Smith Barney today to any specific asset that [Husband] had on April 27, 1996 (the date of the marriage)," Mr. Jacobs replied "[n]ot to the specific asset, no, I can't." In her brief, Wife asserts that Mr. Jacobs' statement admits that, by liquidating the Van Kampen account into cash, the source of the funds deposited into the Fidelity account were rendered untraceable; Wife asserts that Mr. Jacobs' tracing of the funds from the Fidelity account to the Van Kampen account was incomplete.

Mr. Jacobs' testimony and the accompanying chart show the amounts Husband contributed to the Van Kampen and Sun Trust accounts prior to the marriage, follow the path of those funds, and separate the earnings attributed to those contributions. Mr. Jacobs' testimony revealed that, despite the fact that the Van Kampen account was converted into cash, he was able to trace those funds to the Fidelity account. The trial court adopted Mr. Jacobs' classification of the Smith Barney account, holding that "[b]ecause the expert witness traced the funds in a clear and concise manner from the Van Kampen fund on the date of marriage directly to the Smith Barney account on the date of hearing on the divorce, this Court is able to determine the value of this separate property."

We will not overturn a trial court's classification of property unless evidence in the record preponderates otherwise. Tenn. R. App. P. 13(d); *Woodward*, 240 S.W.3d at 828. Mr. Jacobs testified that the funds remained traceable, despite the liquidation of the Van Kampen account into cash, and the trial court adopted this conclusion. Wife has presented no evidence to contradict Mr. Jacobs' testimony or the trial court's findings; as such, we find material evidence exists to support the trial court's classification of a portion of the funds in the Smith Barney account as Husband's separate property.

Wife asserts that, even if the funds were traceable, Husband transmutated them into marital property. The courts of Tennessee have recognized two possible methods whereby property that is separately owned can be converted into marital property for the purpose of equitable division in divorce cases – commingling and transmutation. Transmutation takes place when the parties treat separate property in such a way as to reflect an intention that it become marital property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002); *Batson*, 769 S.W.2d at 858. The doctrine is based on the rationale "that dealing with property in these ways creates a rebuttable presumption that the property was gifted to the marital estate." *Langschmidt*, 81 S.W.3d at 747;

[11] At trial, Husband introduced a chart created by Mr. Jacobs as an exhibit, which the trial court relied upon. According to the chart, the only pre-marital contributions made were to the Van Kampen and Sun Trust accounts, and the only post-marital contributions made were to the Fidelity account (no other contributions were made). The chart then traced the transfer of the Van Kampen account into the Fidelity account, and then the transfer of the Fidelity and Sun Trust accounts into the Smith Barney account. Lastly, the chart showed the pro rata distribution of the earnings between the pre- and post- marital contributions that accrued in all four accounts.

Eldridge v. Eldridge, 137 S.W.3d 1, 13 (Tenn. Ct. App. 2002). The presumption can be rebutted with evidence that a party took great care to maintain the funds as separate property. *See Avery v. Avery*, M2000-00889-COA-R3-CV, 2001 WL 775604, (Tenn. Ct. App. Jul. 11, 2001) (finding husband's separate investment account remained separate despite husband using some of the funds as marital income because evidence showed husband took great care to keep the Fund separate and specifically refused the wife's requests that the entirety of the Fund be placed in a joint account).

Wife asserts on appeal that it was Husband's burden to present evidence that would indicate an intent on his part to maintain the funds in the Smith Barney account as separate property to avoid transmutation. This interpretation is incorrect. Rather, Wife has the burden of proving that transmutation occurred by showing an intent of the parties that the separate property be treated as marital property. *See Keyt*, 244 S.W.3d at 328 n.7.

Wife presented no evidence to show Husband's intent to convert the funds in the Smith Barney account into marital property; in fact, the record contains evidence to the contrary. At trial, Husband presented evidence that the Van Kampen, Fidelity, Sun Trust, and Smith Barney accounts were held in Husband's sole name prior to and during the marriage. The trial court, in its order, found that "[Wife] did not substantially contribute to the preservation and appreciation of [the Smith Barney] account. The account was managed solely by husband." The record lacks any evidence of Husband's intent to convert his pre-marital funds into marital property and contains "proper evidentiary support" to uphold the trial court's division of the Smith Barney account.

Lastly, Wife points out that the trial court failed to equitably divide the portion of the Smith Barney account it classified as marital property. Wife asserts that "the trial court [found] that any increase in the $120,666 should be divided equally, yet [failed] to divide the $120,666. Clearly, this is error on the part of the trial court." Husband's brief does not address this issue. We agree that the trial court erred in not making an equitable division of the $120,666 of the Smith Barney account classified as marital property. Consistent with the trial court's equal division of other marital assets (other than the marital residence) and in the interest of the expeditious resolution of this matter, we modify the order dividing marital property to provide that the $120,666 be divided one-half to each party.

B. The Marital Residence

Wife asserts that the action of the trial court in awarding Husband a 60% interest in the marital residence was based on the court's erroneous classification of Husband's "huge separate capital investment" into the acquisition of the marital home as separate property; Wife asserts that the investment had transmutated into marital property. Husband concedes that his investment transmutated into marital property, asserts that the trial court correctly classified all interest in the residence as marital property, and argues that the trial court simply made an equitable division of interest in the home pursuant to its authority under Tenn. Code Ann. § 36-4-121. We agree with Husband and affirm the lower court's division of interest in the residence.

Division of marital property is governed by Tenn. Code Ann. § 36-4-121. Under this statute, a court may "equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just." Tenn. Code Ann. § 36-4-121(a)(1). Factors which are to be considered by the court in making such division are listed under Tenn. Code Ann. § 36-4-121(c). "[A]n equitable property division is not necessarily an equal one." *Batson*, 769 S.W.2d at 859.

Tenn. Code Ann. § 36-4-121 "gives a trial court wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly owned property." *Batson*, 769 S.W.2d at 859. This Court will afford the trial court's division of the marital estate great weight on appeal, and will overturn it if the evidence preponderates otherwise. *Id.*

The trial court, in its order, found the following facts regarding the marital estate:

> The testimony from [Husband] was that he owned a house in Houston, that he sold it for $150,000 profit[12] and used that profit on the marital home as a part of the $750,000 sales price. Husband also testified he spent his entire inheritance from a relative, close to $300,000 on the house. At trial, Husband said the total inheritance and personal funds spent on the home totaled $650,000...
>
> Because of the huge separate capital investment by Husband, this Court is giving him 60% of the profit from the sale and Wife 40%.

A trial court may consider "[t]he contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property...," Tenn. Code Ann. § 36-4-121(c)(5), when it divides joint property "in proportions...the court deems just." *Batson*, 769 S.W.2d at 859. That property division is afforded great weight on appeal unless this Court finds evidence to preponderate otherwise. *Id.* It is undisputed that Husband's contribution to the marital home had transmutated into marital property; thus the question is whether the record contains evidence that preponderates against a finding that the trial court's division of the marital property was equitable. Wife presents no evidence to show that the division of the marital residence was not equitable. A trial court is required to made an equitable division, not an equal one, and the trial court did not abuse its discretion in adjusting the division of ownership of the marital residence in light of Husband's investment of separate funds into its acquisition.

[12] The trial court granted a post-trial Motion to Amend to correct the language of this order to state that the sale of the home in Houston led to $150,000 in *proceeds*, not profit.

C. Division of Marital Assets

Wife's final argument is that the award of marital property to Husband should have been reduced by $100,000, and Wife's property award increased by the same, because of Husband's alleged use of marital funds to pay his attorney's fees.[13] Wife asserts that, despite the trial court's agreement to consider Husband's conduct when dividing the marital property, the trial court ultimately failed to do so. Nowhere in the Final Order does the trial court make a factual finding or render a judgment regarding Husband's alleged use of $100,000 from marital assets to pay for his attorney's fees and the court ordered each party to pay his or her own counsel fees. The only reference to this matter in the record cited to this court is the following discussion between Wife's counsel and the court:

> MS. LYLE: We actually did ask for attorney's fees, Your Honor, but the real issue here is, since they've all been paid of – especially drawing out $100,000 out of this marital asset -- at the lease [sic], they ought to be equalized, so that she receives enough of Dr. Jon Nesbitt's –
> THE COURT: I agree.

Inasmuch as the court, finding that "[t]hey both have sufficient funds to [pay their fees]," expressly declined to award either party attorneys' fees and, further, declined to award Wife alimony, we consider this issue to be one solely related to the division of marital property, with Wife contending she should receive $100,000 more than she received because of Husband's alleged use of marital funds to pay his counsel fees.

As stated earlier, Tenn. Code Ann. § 36-4-121 "gives a trial court wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly owned property." *Batson*, 769 S.W.2d 849, 859. Trial courts are afforded wide latitude in equitably dividing marital property, and this Court will give those decisions great weight on appeal. *Wilson v. Moore*, 929 S.W.2d 367 at 372 (Tenn. Ct. App. 1996). A trial court's division will be overturned if the distribution "lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures." *Herrera*, 944 S.W.2d at 389 (citing *Wade*, 897 S.W.2d at 715). The fact that a court's division of property is not equal does not mean it is not equitable. *Batson*, 769 S.W.2d at 859. This Court will affirm a trial court's division of marital property unless evidence in the record preponderates otherwise. *Batson*, 769 S.W.2d at 859.

In addition to the Smith Barney account and the marital residence, the Final Order divided the other marital property, including additional investment accounts and personal property. Wife has cited no evidence to support her contention that the trial court erred in its application of Tenn.

---

[13] Wife does not cite to any portion of the record to support her assertion that Husband used marital funds to pay his counsel fees and the trial court made no such finding. The November 13, 2006, order granted both Wife's counsel and Husband's counsel a lien on property at 4426 Brookfield Drive, Nashville, to secure unpaid fees and expenses.

Code Ann. § 36-4-121 or that the factual findings relative to the division of marital property lack evidentiary support. In the absence of evidence supporting the contention, we cannot say that the trial court abused its discretion in making the award of marital property.

CONCLUSION

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED AS MODIFIED. The case is remanded to the Circuit Court of Davison County for collection of costs and for such other proceedings as may be necessary. Costs of the appeal are assessed equally between the parties, for which execution may issue if necessary.

_____

RICHARD H. DINKINS, JUDGE